



EPA Region 5 Records Ctr.



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U.S. Department of Justice

Environment and Natural Resources Division

BSG:AML
D/ No. 90-11-3-1620/2Environmental Enforcement Section
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July 12, 2001

VIA TELECOPY AND REGULAR MAIL

Jonathon Conte, Esq.
Blank Rome Comisky & McCauley LLP
PNC Center
201 E. Fifth St., Suite 1700
Cincinnati, OH 45202

Re: United States v. Aeronca, Inc. et al.
Civil Action No. 1:01 CV 00439
Settlement Demand; Request for Ability-to-Pay Information

Dear Jonathon:

Earlier today, by means of a letter different from this one, I sent you a formal request for a waiver of service of summons, pursuant to the waiver provisions of the Federal Rules of Civil Procedure. You should get that request, and a copy of the complaint, by early next week. You (or your clients) will have thirty days from today to sign the waiver, and if you (or your clients) do sign the waiver, your clients will have sixty days from today to respond to the complaint.

With the additional time, we would like to try to reach a settlement with your clients. We hope your clients will give serious consideration to the major risk facing them if this matter is not settled: the risk of joint and several liability for the United States' \$4.3 million in outstanding costs. While we appreciate your clients' view that they have no liability for disposing of construction debris, we have caselaw and expert analysis supporting our contention that your clients do have liability for such disposal. We note that in an early conference with Judge Weber in the private contribution case, Judge Weber indicated that if any PRP "deposited one empty lead paint can on this site [it] possibly could be responsible for the entire 14 million" dollar remedy. Transcript of Proceedings before the Honorable Herman J. Weber, C-1-97-307, at 10 (S.D. Ohio, August 15, 1997). At least one other PRP settled this matter despite having transported only construction debris. Moreover, we believe that your clients transported more than mere construction debris. Finally, we do not believe that your clients have any viable statute of limitations defense to the action that we filed against them. Assuming arguendo that your clients do have such a defense, it clearly is inapplicable to costs related to the remedial action (which is ongoing). We have far more in remedial action costs at this Site than the amount of the demand we are making below.

At this point, we renew our request, first made last year and renewed in the recent 104(e) request, that your clients provide us with those portions of the ADR allocator's report applicable to your clients. The case management order mandating the confidentiality of information developed during the ADR process does not apply to information regarding the person to whom a request for such information is directed. All other non-settlers, except for the entities controlled by Dick Clarke, provided us with their ADR information. If your clients continue to decline to provide it, we will, of course, request it through appropriate processes. We have difficulty believing that Judge Weber will consider the material non-discoverable. We also have difficulty believing that Judge Weber will make us "reinvent the wheel" through protracted discovery in this action.

We are aware that the plaintiffs in the private contribution suit made a settlement demand of \$583,657 against the entities controlled by Marty Clarke. The United States is compelled to increase that demand for two reasons. First, since that demand, EPA's indirect cost methodology has changed. As you are aware, EPA's change was widely publicized last year, and all PRPs were put on notice that a failure to settle pending actions by October of 2000 could result in the allocation of additional indirect costs at all sites. In this case, we have estimated that the increased costs – that is, the costs that are not reflected in the \$4.3 million mentioned above – are at least \$500,000. Our second reason for increasing the settlement demand is that we have had to file a lawsuit against your clients. As you are aware, PRPs who do not "step up to the plate" to assume their Superfund liabilities generally are assessed a premium.

For purposes of determining the increase in our settlement demand that your client should pay based on the new indirect rate, we have calculated that \$583,657 represents approximately 13.5% of our total outstanding costs (i.e., of \$4.3 million). Because we estimate that our increased indirect costs on this Site are at least \$500,000, we have assigned your clients 13.5% of this additional \$500,000, or \$67,500. That make the total \$651,157 (\$583,657 plus \$67,500). Then, we have added an additional 10% (\$65,115) as a premium for failing to settle. Thus, our demand is \$716,272 (\$583,657 plus \$65,115).

We understand that your clients now would like us to evaluate their ability to pay. Could you please provide the following documents:

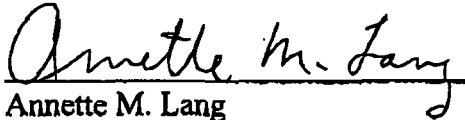
- (1) The last 5 years of tax returns;
- (2) The last 5 years of financial statements;
- (3) An "interim" financial statement that reflects the time between the date of your clients' last "formal" financial statement and June 30, 2001.

Please send them so that I receive them on Wednesday, July 25, 2001. My federal express address is: 1425 New York Ave., NW, Suite 13073, Washington, DC 20005. It is quite likely that our corporate analyst will need more information than this, but this information is the starting point.

Your clients never have made a settlement offer to us. We would appreciate receipt of a settlement offer. If your clients are unable to prepare such an offer by July 25, 2001, please let me know by that time when your clients will be prepared to make such an offer. We intend to file a consent decree with the court by the end of August regarding the settlements that we have reached (we have two in hand now, and we hope to have at least two more by then). After that time, we will be prepared to identify for the Court a proposal for the management of this case. Thus, please recognize that we hope to wrap settlements up by the end of August, including any settlement with your clients.

Thank you for your prompt attention to the matters raised herein.

Sincerely,


Annette M. Lang
Trial Attorney

cc: Craig Melodia (via fax)